

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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In the Matter of BK and SK, Minors.

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FAMILY INDEPENDENCE AGENCY,

UNPUBLISHED

Petitioner-Appellee,

v

No. 227073  
Emmet Circuit Court  
Family Division  
LC No. 97-004131-NA

LISA KIBBY,

Respondent-Appellant,

and

HAROLD GREEN and DANI R. MALM,

Appellees.

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Before: Wilder, P.J., and Hood and Cavanagh, JJ.

CAVANAGH, J. (*dissenting*).

I respectfully concur in part and dissent in part. I dissent only as to the majority's reasoning and conclusion regarding respondent's claim of ineffective assistance of counsel on the basis that her attorney failed to raise, investigate, and/or pursue the application of the ICWA to the termination proceeding. For the following reasons, I would remand this matter to the family court for fact finding as to the applicability of the ICWA and for an evidentiary hearing on respondent's ineffective assistance of counsel claim.

Review of the record evidence reveals that respondent testified at the preliminary hearing that she was of Native American heritage. Thereafter, an order was entered directing the FIA to further investigate and pursue the matter. At some later date, Dickinson, of the FIA, contacted respondent by telephone for assistance in completing the Indian Tribal Certification Request form. The completed form indicated that respondent was of either Blackfoot or Apache ancestry. Dickinson then forwarded the completed form to the BIA and the BIA responded with a request

for additional information.<sup>1</sup> The evidence of inquiry ends with correspondence from Dickinson to respondent's counsel requesting additional information. There is no other documentation in the lower court file and no factual determination on the record regarding the applicability of the ICWA. Similarly, there is no record of any further efforts by respondent's counsel, the family court, or the FIA to comply with the requirements of the ICWA.

Although the majority assumes that the necessary information was likely requested at a plea hearing where respondent, her counsel, and Dickinson were all present, such speculation is not tantamount to fact. Further, the majority concludes that, because respondent was absent from the geographical area, any attempt by counsel to contact respondent for the necessary information would have been difficult. However, there is no evidence that respondent's counsel made any such attempts, that respondent was non-compliant with his efforts, or even that respondent's counsel had notice that additional information was required by the BIA.

Respondent's counsel had a duty to advocate respondent's cause and protect her rights by reasonably investigating the law and facts of the case. See *Strickland v Washington*, 466 US 668, 688, 690; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Although it was not respondent's responsibility to establish the applicability of the ICWA, respondent's counsel had a duty to ensure that respondent's rights were protected. See *In re IEM*, 233 Mich App 438, 449; 592 NW2d 751 (1999). I would hold that, under the circumstances of this case, the record is insufficient to determine whether respondent's counsel's performance fell below an objective standard of reasonableness and was prejudicial.

When the ICWA is applicable to a termination proceeding, the petitioner is required to meet a dual burden of proof, i.e. a finding beyond a reasonable doubt, after appropriate expert witness testimony, that "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child," in addition to a finding that clear and convincing evidence supports termination under the applicable state statutory ground. *In re Elliott*, 218 Mich App 196, 209-210; 554 NW2d 32 (1996). Consequently, the applicability of the ICWA significantly impacts the termination proceeding and respondent's rights to such an extent that conjecture or silence should not be sufficient to discharge respondent's counsel's, the family court's, or the FIA's duty to investigate its application and stringently adhere to its requirements. Therefore, I would conditionally affirm the family court's termination order and remand for a conclusive determination of the applicability of the ICWA and for an evidentiary hearing on respondent's ineffective assistance of counsel claim.

/s/ Mark J. Cavanagh

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<sup>1</sup> It is unclear from this very limited record why Dickinson did not provide notice to the Blackfoot and Apache tribes. The ICWA requires that petitioner send notice to the child's tribe and respondent's children were potentially members of one or both of these tribes. See 25 USC 1912(a); *In re NEGP*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 226663, issued 3/16/01), slip op at 3.